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8 Michael Lacey

9 UNITED STATES DISTRICT COURT
10 FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

11
12 **In the Matter of the Seizure of:**

13 Any and all funds held in Republic Bank
14 of Arizona Account(s) xxxx1889,
xxxx2592, xxxx1938, xxxx2912, and
xxxx2500.

CASE NO. 2:18-cv-6742-RGK (MAAx)
18-MJ-00722-PJW

[Related to Case Nos. 18-MJ-00712,
18-MJ-00713, 18-MJ-00715,
18-MJ-00716, 18-MJ-00718,
18-MJ-00719, 18-MJ-00720,
18-MJ-00721, 18-MJ-00723,
18-MJ-00724, 18-MJ-00751,
18-MJ-00797, 18-MJ-00798,
18-MJ-00996, 18-MJ-00997,
18-MJ-01427, and 18-MJ-1863]

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**CLAIMANT'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR RELEASE
OF CERTAIN UNTAINTED FUNDS**

(First request)
(Oral Argument Requested)

INTRODUCTION

Claimant Michael Lacey respectfully moves this Court to issue an order requiring the government to immediately release certain funds to him because those

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[Signature]

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1 funds are untainted and their immediate release is necessary to ameliorate the undue
2 harm he has suffered from the government's improper seizure. As discussed in
3 greater detail below, Mr. Lacey has demonstrated to the government that these
4 particular funds are untainted; nonetheless, the government has refused to release
5 them or to investigate the propriety of the government's seizure of the funds. These
6 funds are vital to Mr. Lacey's ability to pay for his living expenses and are equally
7 important to fund his defense in a criminal action pending in the District of Arizona.
8 Because the government's seizure of these untainted funds as well as others has
9 rendered Mr. Lacey unable to meet his daily financial obligations, and to defend
10 himself against the charges pending in the District of Arizona, Mr. Lacey
11 respectfully requests that this Court hear the instant motion on an accelerated basis
12 and grant the relief requested.

13 **BACKGROUND**

14 **I. The government has sought and obtained the pretrial restraint of the vast
15 majority of Mr. Lacey's assets.**

16 On March 28, 2018, a grand jury sitting in the District of Arizona issued an
17 indictment ("Indictment") against Mr. Lacey and his co-defendants in the case
18 captioned *United States v. Lacey*, 18-CR-00422-PHX-SPL (BSB) ("Arizona
19 Prosecution"). (*See* Indict., attached as Ex. A to the Declaration of Paul J. Cambria
20 ("Cambria Decl.").) The government charged Mr. Lacey with conspiracy to facilitate
21 prostitution (18 U.S.C. §§ 371, 1952(a)(3)(A)), facilitation of prostitution (18 U.S.C.
22 §§ 1952(a)(3)(A), (b)(1)(i)), conspiracy to commit money laundering (18 U.S.C. §
23 1956(h)), concealment money laundering (18 U.S.C. § 1956(a)(1)(B)(i)), international
24 promotional money laundering (18 U.S.C. § 1956(a)(2)(A)), and transactional money
25 laundering (18 U.S.C. § 1957). (*See id.* at ¶¶ 157-71.) These charges purportedly arise
26 out of Mr. Lacey's former involvement with the web-publishing entity Backpage.com,
27 LLC ("Backpage") which operated a website to which third-party users had the ability

1 to post content. (*See id.* at ¶¶ 1-16.) The government's theory is that Mr. Lacey should
 2 be held criminally liable for the content of advertisements posted to Backpage by third-
 3 party users by virtue of his prior involvement with Backpage. (*See id.*) Mr. Lacey
 4 pleaded not guilty to the crimes charged and has mounted a vigorous defense to the
 5 government's theory.¹

6 By the time the original Indictment was unsealed, the government had seized
 7 the vast majority of Mr. Lacey's assets, even though he must be presumed to be
 8 innocent of the crimes charged at this stage, and the conduct upon which the Indictment
 9 is based involves presumptively protected First Amendment activities. Further
 10 complicating the seizure issues in this case is that Mr. Lacey earned substantial income
 11 long before Backpage was formed and he continues to earn substantial income separate
 12 and apart from Backpage. (*See Henze Cook Decl.* ¶ 41.) Nonetheless, he has been
 13 barred from the use of the vast majority of his assets. (*See id.* ¶¶ 9-12.)

14

**II. The government's pretrial restraint of Mr. Lacey's assets causes daily
 15 hardships.**

16 Each day that the government's pretrial restraint of Mr. Lacey's assets remains
 17 in place causes an undue hardship because the restraint has rendered Mr. Lacey unable
 18 to meet basic financial obligations. (*See id.*) Mr. Lacey has bills related to living
 19 expenses that he is unable to pay. (*See id.* ¶ 9.) Further, the restraint of his assets has,
 20 at times, made compliance with his conditions of release difficult. (*See id.* ¶¶ 10-11.)

21 Compounding the daily personal struggles presented by lack of access to funds,
 22 the government's pretrial restraint of Mr. Lacey's assets has rendered him unable to
 23 defend the instant charges. (*See id.* ¶ 12.)

24

25¹ A grand jury, sitting in the District of Arizona, returned a superseding indictment against
 26 Mr. Lacey and his co-defendants on July 25, 2018. (*See Super. Indict.*, attached as Ex. C to the
 27 Cambria Decl.) The government's theory of liability is the same as that alleged in the original
 Indictment. (*See id.*)

1 **III. The government rebuffed Mr. Lacey's request for prompt disclosure of the**
2 **seizure warrants, warrant applications, and forfeiture orders.**

3 In recognition of the devastation that the government's pretrial restraint of Mr.
4 Lacey's assets would and does have on him, Mr. Lacey's counsel immediately
5 requested that the government provide the seizure warrants, warrant applications, and
6 forfeiture orders issued in connection with the seizure of his assets. (*See* Cambria Decl.
7 ¶ 9; Henze Cook Decl. ¶¶ 27, 33.) Initially, the government denied that it had the
8 ability to produce those documents any earlier than the end of May, even though each
9 day that Mr. Lacey's assets remained subject to seizure caused undue hardship on him.
10 (*See* Cambria Decl. ¶ 13.) Consequently, Mr. Lacey and his co-defendants moved for
11 the prompt disclosure of those documents and for the accelerated hearing of their
12 disclosure motion. (*See* Defs.' Mot. for Discl., attached as Ex. B to the Cambria Decl.)
13 On May 18, 2018, the government began disclosing the requested documents to Mr.
14 Lacey and his co-Defendants. (*See* Cambria Decl. ¶ 16.) The government's disclosure
15 rendered the discovery motion moot.

16 **IV. The government has sought and obtained the pretrial restraint of funds**
17 **that are unrelated to Backpage.**

18 Separate and apart from the constitutional challenges Mr. Lacey has brought and
19 may bring with respect to the seizure of revenue or assets derived from his involvement
20 with Backpage, a brief review of Mr. Lacey's financial records indicates that the
21 government's pretrial restraint of the funds in three of Mr. Lacey's accounts with
22 Republic Bank was improper because those funds are unrelated to Backpage. On May
23 5, 2017, Cereus Properties LLC ("Cereus") issued a check payable to Mr. Lacey in the
24 amount of \$451,205.36. (*See* May 5, 2017 Check, attached as Ex. C to the Henze Cook
25 Decl.) On May 23, 2017, Cereus issued a check payable to Mr. Lacey in the amount
26 of \$225,602.68. (*See* May 23, 2017 Check, attached as Ex. D to the Henze Cook Decl.)

1 The total of those two checks is \$676,808.04. (See Exs. C, D to the Henze Cook Decl.)

2 The checks were not endorsed; instead, they were voided. (See *id.*)

3 Michele McSherry, the Office Manager for Cereus, indicated that those two
4 checks constituted distributions owed to Mr. Lacey from Village Voice Media
5 Holdings. (See May 14, 2018 Michele McSherry Decl., attached as Ex. E to the Henze
6 Cook Decl., at ¶¶ 3-4.) Shortly after receipt of the checks, Mr. Lacey contacted Cereus
7 and asked that the funds be wired to his account at Republic Bank ending in 2485
8 instead. (See *id.* at ¶ 6.) Ms. McSherry intended to wire the money to Mr. Lacey's
9 account from a Cereus account ending in 4862 ("4862 Cereus Account"). (See *id.* at ¶
10 7.) The 4862 Cereus Account contains funds generated solely by Village Voice Media
11 Holdings and rental income from the Phoenix New Times newspaper building. Those
12 sources of revenue are unrelated to Backpage. (See Henze Cook Decl. ¶ 41.)

13 However, by virtue of nothing more than a clerical error on her part, Ms.
14 McSherry wired the funds to Mr. Lacey's account from a Cereus account ending in
15 3873 ("3873 Cereus Account"). (See Ex. E to Henze Cook Decl. at ¶ 7.) The 3873
16 Cereus Account holds funds generated from Backpage. (See Henze Cook Decl. ¶ 47.)
17 Critically, on June 1, long before commencement of the instant prosecution, Ms.
18 McSherry recognized the mistake and transferred \$676,808.04 from the 4862 Cereus
19 Account to the 3873 Cereus Account to rectify the two accounts. (See Ex. E to Henze
20 Cook Decl. at ¶¶ 9-11.) A contemporaneous bank statement for the 4862 Cereus
21 Account indicates that Ms. McSherry did, in fact, rectify those two accounts on June
22 1, 2017. (See June 2017 Statement for 4862 Cereus Account, attached as Ex. F to the
23 Henze Cook Decl.)

24 Ms. McSherry's clerical error was compounded by the fact that Mr. Lacey
25 transferred funds from the Republic Bank account ending in 2485—an account he has
26 always understood to hold funds generated solely from Village Voice Media Holdings
27 and the rent from the Phoenix New Times newspaper building—to two other bank

1 accounts held at Republic Bank (accounts ending in 1897 and 3126). (See Henze Cook
2 Decl. ¶ 14.) Those accounts, too, have been seized by virtue of receiving funds from
3 the Republic Bank account ending in 2485. There are no independent allegations of
4 taint regarding those two accounts. (See *id.* at ¶ 38 n.3.)

5 **V. Mr. Lacey attempted to obtain release of the funds that are unrelated to**
6 **Backpage without judicial intervention.**

7 On May 16, 2018, amid discussions with the government about prompt
8 disclosure of the seizure documents, Mr. Lacey's counsel contacted the government to
9 seek the immediate release of the funds held in Republic Bank accounts ending in
10 2485, 1897, and 3126. (See May 16, 2018 Email from J. Cook to J. Kucera, attached
11 as Ex. G to the Henze Cook Decl.) To allay the government's concern about the
12 propriety of those funds, counsel provided the government with the McSherry
13 Declaration, the voided checks, and the June 2017 statement for the 4862 Cereus
14 Account. (See *id.*) Further, Mr. Cambria conveyed to the government that Ms.
15 McSherry was willing to speak with the government about the wire transfer and the
16 clerical error. (See Cambria Decl. ¶ 19; Ex. H to the Henze Cook Decl.)

17 To Mr. Lacey's detriment, the government has refused to release the funds to
18 him without conducting its own investigation. (See Ex. G to the Henze Cook Decl.)
19 After being repeatedly pressed by defense counsel for a decision on the release of the
20 funds, which is vital to Mr. Lacey's ability to pay for living expenses and a defense to
21 the Arizona Prosecution, the government indicated that it could not reach a decision
22 by May 25, 2018. (See Ex. H to the Henze Cook Decl.) Since then, the government
23 has indicated that it will not interview Ms. McSherry or otherwise investigate the
24 propriety of the government's seizure of these funds. Instead, the government
25 indicated that it will not take any action on these funds outside the context of a civil

1 forfeiture action (which it has not brought) and civil discovery. (See Cambria Decl. ¶
 2 22.)

3 ARGUMENT

4 Mr. Lacey respectfully requests that this Court enter an order requiring the
 5 government to release the funds held in Mr. Lacey's Republic Bank accounts for
 6 accounts ending in 2485, 1897, and 3126 because those funds are unrelated to
 7 Backpage and the government cannot seek pretrial restraint of assets that are unrelated
 8 to Backpage. It is well-settled that the government has no authority to seize so-called
 9 untainted assets prior to trial. *See Luis v. United States*, 578 U.S. ___, 136 S.Ct. 1083,
 10 1094 (2016) ("We have found no decision of this Court authorizing unfettered, pretrial
 11 forfeiture of the defendant's own 'innocent' property—property with no connection to
 12 the charged crime."); *cf. United States v. Ripinsky*, 20 F.3d 359, 363 (9th Cir. 1994)
 13 ("[S]ubstitute assets are not subject to pretrial restraint.").

14 Here, the government's continued pretrial restraint of Mr. Lacey's funds held in
 15 Republic Bank accounts ending in 2485, 1897, and 3126 does not withstand scrutiny
 16 of any kind. The funds at issue are derived from the sale of Village Voice Media
 17 Holdings, one of the many sources of income distributed to Mr. Lacey separate and
 18 distinct from Backpage. Consequently, the government's continued restraint of Mr.
 19 Lacey's income derived from the sale of Village Voice Media Holdings is
 20 unjustifiable. The government's continued use of the "nuclear weapon of the law" in
 21 connection with the Arizona Prosecution should be cabined, and with respect to these
 22 particular funds, curtailed. *See Grupo Mexicano de Desarrollo S.A. v. Alliance Bond*
 23 *Fund, Inc.*, 527 U.S. 308, 329 (1999) (alteration omitted).

24 Equally important, Mr. Lacey had no involvement with or knowledge of Ms.
 25 McSherry's clerical error. (See Henze Cook Decl. ¶ 50.) In fact, Ms. McSherry's
 26 clerical error was contrary to Mr. Lacey's long-standing instructions to Cereus to limit
 27 its wire transfers into his Republic Bank account ending in 2485 to revenues generated

1 solely from Village Voice Media Holdings and the rent from the Phoenix New Times
2 newspaper building. (*See id.* ¶ 45.) Therefore, Mr. Lacey could not have had the
3 requisite specific intent to launder the \$676,808.04 at issue in violation of the money
4 laundering statutes charged in the Indictment or Superseding Indictment (18 U.S.C. §
5 1956(a)(1)(B)(i) and 18 U.S.C. § 1957(a)) when he had *no prior knowledge* of the
6 actions Ms. McSherry undertook to cause the error and the error was *contrary to* the
7 instructions he had given Cereus.

8 As the Ninth Circuit has explained, “[m]oney laundering is a specific intent
9 crime, and it requires *knowledge on the part of the defendant.*” *United States v.*
10 *Gurolla*, 333 F.3d 944, 957 (9th Cir. 2003) (emphasis added). In particular, to establish
11 money laundering under 18 U.S.C. § 1956(a)(1)(B)(i), the government must establish
12 that a defendant “*knowing* that the property involved in a financial transaction
13 represents the proceeds of some form of unlawful activity, conducts or attempts to
14 conduct such a financial transaction which in fact involves the proceeds of specified
15 unlawful activity . . . *knowing* that the transaction is designed in whole or in part to
16 conceal or disguise the nature, the location, the source, the ownership, or the control
17 of the proceeds of specified unlawful activity.” *Id.* (emphasis added). Similarly, under
18 18 U.S.C. § 1957, to establish money laundering, the government must prove that a
19 defendant “*knowingly* engages or attempts to engage in a monetary transaction in
20 criminally derived property of a value greater than \$10,000 and is derived from
21 specified unlawful activity.” *Id.* (emphasis added). Neither of these statutes permit
22 conviction for money laundering when the defendant is oblivious to the purported
23 unlawful financial transaction at issue. Further, there are no known cases of money
24 laundering under these charges that result in a conviction when a third party engages
25 in a transaction unknown to a defendant and *contrary to the specific instructions given*
26 *by the defendant.*

Mr. Lacey's counsel continues to review the disclosed documents and reserves the right to bring additional challenges to the government's seizures, and has joined in the motion filed by James Larkin challenging the government's pretrial restraint of the assets of the defendants named in the Arizona Prosecution. However, the isolated clerical error resulting in the seizure of the Republic Bank accounts ending in 2485, 1897, and 3126 and the urgent need for release funds to pay for living expenses and a defense, merits the instant motion for immediate release of the funds held in those accounts.

CONCLUSION

In light of the foregoing, Mr. Lacey moves for an order requiring the government to release the funds held in his Republic Bank accounts 2485 because Mr. Lacey has demonstrated that those funds are unrelated to Backpage and cannot be subjected to pretrial restraint. Further, because that account held only funds unrelated to Backpage, and there are no independent allegations of taint regarding Mr. Lacey's Republic Bank accounts ending in 1897 and 3126, Mr. Lacey respectfully requests that this Court order the government to release all funds held in those accounts as well. Due to the tenuous financial position in which the government has placed Mr. Lacey, Mr. Lacey respectfully requests the accelerated hearing of this motion.

Respectfully submitted,

/s/ *Paul J. Cambria, Jr.*

LIPSITZ GREEN SCIME CAMBRIAL LLP

Atorneys for Defendant Michael Lacey

Sworn to before me this
10th day of August, 2018.

s/ April Kelly

Commissioner of Deeds

In and For the City of Buffalo, N.Y.

My Commission expires December 31, 2018